

**TESTIMONY OF DEBORAH SMITH
ON BEHALF OF THE WASHINGTON CHAPTER
OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION**

**HB 392 - AN ACT TO ELIMINATE THE MISAPPLICATION OF THE 14TH AMENDMENT
TO THE UNITED STATES CONSTITUTION**

**HEARING, HOUSE FEDERAL RELATIONS, ENERGY AND TELECOMMUNICATIONS
COMMITTEE
FEBRUARY 7, 2011**

HB 392 provides a definition of the Citizenship Clause of the Fourteenth Amendment of the United States Constitution, and amends state statutory definitions of citizenship. The bill's definition of the Citizenship Clause is constitutionally impermissible. It is preempted by, and conflicts with, long-settled federal constitutional law governing citizenship. Moreover, even if the bill were constitutionally permissible, which it is not, it would create absurd distinctions between who is a state citizen and who is not, and would require a new state-citizenship bureaucracy to determine citizenship under the terms of the bill. HB 392 would cost Montana a great deal of money to implement, as well as injury to our residents and businesses. It is the opinion of the Washington State Chapter of the American Immigration Lawyers Association that if this bill were turned into law, it will ultimately be overturned in the courts. While we acknowledge that there is a need for immigration reform, this bill is not the right approach, both from a legal standpoint and as a matter of policy. Accordingly, we oppose HB 392.

AILA is a national association with approximately 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. Its Washington Chapter is comprised of more than 330 members throughout the Northwest states, who practice in various areas of immigration law, including naturalization and citizenship. In addition to the many people we represent in our individual practices in citizenship and naturalization proceedings, our members have helped hundreds of people to become US citizens through pro bono participation in statewide Citizenship Days over the last several years. We are knowledgeable about the subject matter addressed in HB 392.

It has been settled law for well more than 100 years, that, subject to very narrow exceptions, everyone born in the United States is a US citizen pursuant to the Citizenship Clause. The exceptions to 14th-amendment citizenship are limited to children of diplomats or invading military forces, and to Native Americans, who are citizens by virtue of federal statutes enacted in 1924 and 1940. *See United States v. Wong Kim Ark*, 169 U.S. 649 (1898); and *Elk v. Wilkins*, 112 U.S. 94 (1884). There is not a shred of legal support for the proposition that immigrants, whether authorized or unauthorized, are not subject to the jurisdiction of the United States. Among other things, immigrants must obey all criminal and civil laws while they are present in the United States; they must pay taxes; they may be deported from or denied admission to the United States; they may be incarcerated; they must register for the Selective Service. To suggest that immigrants are not subject to the jurisdiction of the United States is simply factually, and legally, wrong. More information on birthright citizenship law and policy is available from the American Immigration Council here: <http://www.immigrationpolicy.org/just-facts/defending-fourteenth-amendment-resource-page>

HB 392 provides that people "born in and subject to the jurisdiction of the United States" and who reside in Montana are Montana citizens. Page 1, lines 13 - 15. It then explains that to be "subject to the jurisdiction of the United States", a person must have at least one parent who owes no allegiance to any foreign sovereignty. Page 1, lines 16 - 18. Thereafter, HB 392 says that a person who owes no

allegiance to any foreign sovereignty is a United States citizen or national, a lawful permanent resident in the United States, or a stateless person. Page 1, lines 19 - 21. This astonishing concept of the word "allegiance" lacks any basis in law. In the first place, there are millions of US citizens who are also nationals or citizens of other countries, and have multiple passports to prove it; these individuals would owe allegiance to their other countries of nationality, as well as to the United States. Secondly, lawful permanent residents of the United States by definition owe an allegiance to the country of their citizenship. The concept of "allegiance" set forth in this bill is little more than a syllogism, conflicts with federal law, and would appear to deny many US citizens Montana citizenship if they are also citizens or nationals of another country.

HB 392 also allows naturalized citizens who reside in Montana to be Montana citizens. See Page 1, lines 22 - 25. Curiously, naturalized citizens are not subject to the peculiar "allegiance" requirement imposed on 14th amendment citizens. Naturalized citizens apparently may gain Montana citizenship, even if they share citizenship with the United States and another country.

Lastly, and perhaps most remarkably, HB 392 declares that Montana citizenship fails to convey any "right, privilege, immunity, or benefit under law". Page 1, lines 26 - 27. If that is so, the purpose of the bill is opaque indeed. It would be curious for Montana to enact a bill with no substantive purpose, and which will surely be challenged in federal court as unconstitutional (possibly for a number of reasons, such as preemption, equal protection, and due process), and expensive to defend and implement.

And make no mistake - HB 392 will be costly to implement, assuming it would survive an expensive court challenge (which AILA believes it won't). For example, Montana will need a new team of state workers to determine whether a person born in the state qualifies for Montana citizenship. (HB 392 has a companion proposal, LC 2009, which allows for compacts among Montana and other states, and which requires different birth certificates to be issued to state citizens and not-state citizens.) The bureaucratic apparatus necessary to determine the parental citizenship or immigration status of all children born in the state will be impressive. For starters, Montana will need experts in the *jus sanguinis* (bloodline) citizenship laws of other countries, to determine if a child born in Montana is stateless, or has inherited citizenship in a country of a parent's citizenship or nationality. In addition, all parents who are US citizens under the 14th amendment - which will be the vast majority of Montanans - will have to be screened for dual nationality, because such people appear to be incapable of transmitting Montana citizenship. This categorization is not only nonsensical, and almost assuredly illegal, it would be enormously complicated and expensive to administer.

With the exception of First Nation peoples, we are all immigrants or the descendants of immigrants in the United States. One of the bedrock principles on which our country is founded is birthright citizenship. It separated us in colonial times from our continental European forbearers, for whom blood lineage was determinative of one's station in life, as well as citizenship. Birthright citizenship keeps the challenge of immigrant integration confined to the first generation in an immigrant family, because all subsequent generations of the family are United States citizens. Our country has been overwhelmingly successful in integrating immigrants from all over the world into American culture. Even as the United Kingdom has retrenched on birthright citizenship, birthright citizenship has remained a simple, unwavering statement of equality in the United States. The proponents of HB 392 and similar bills would have us go back to the days of *Dred Scott*, when people were denied citizenship based on a disfavored characteristic. Then it was race; today it is immigration status. *Dred Scott* was not in keeping with our proud common-law tradition of birthright citizenship. Neither is HB 392. AILA urges the committee the table HB 392.